

# EMPLOYMENT LAWS

## FREQUENTLY ASKED QUESTIONS

### **Wage & Hour Related Questions:**

(Contact ERD Wage & Hour – 406-444-5600 if you need more information)

#### **1. Question: When are wages due if an employee quits, is laid off or is discharged?**

**Answer:** Wages are not due to an employee who quits until the next regular payday for the period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee.

If an employee is laid off or discharged, all wages are due immediately upon separation **unless** the employer has a **written** personnel policy that extends the time for payment of final wages to the employee's next regular payday for the period or to within 15 days from the separation, whichever occurs first.

When an employee is discharged by reason of an allegation of theft connected to the employees' work, the employer may withhold from the employees' final paycheck an amount sufficient to cover the value of the theft if:

- a. The employee agrees in writing to the withholding; or
- b. The employer files a report of the theft with the local law enforcement agency within 7 days of the separation from employment.

If no charges are filed in a court of competent jurisdiction within 15 days of the filing of the report with local law enforcement, wages are due and payable upon expiration of the 15-day period. If the employee is found not guilty of the charges or if the employer withholds an amount in excess of the value of the theft, the court may order the employer to pay the employee the withheld amount plus interest.

**Reference: MCA 39-3-205**

#### **2. Question: Is it okay for an employer to require that all keys and uniforms be returned before paying employees their final paycheck?**

**Answer:** No, you must still follow the law as explained in the preceding answer.

#### **3. Question: Can I withhold payment of wages to offset charges made by the employee at my business?**

**Answer:** Only if you have a signed agreement of this arrangement with the employee.

#### **4. Question: Can I require that employees come to my business to get their final paycheck?**

**Answer:** You must pay through regular pay channels OR by mail if requested by the employee.

#### **5. Question: Can I deduct from wages the amount of damages caused by an employee?**

**Answer:** No, wages cannot be withheld for shortages, damages or mistakes.

#### **6. Question: Can I pay my employee less than minimum wage during a training period?**

**Answer:** No, there is no training wage in Montana. Even if an employee signs an agreement to work for less than minimum wage, it is unenforceable because it is illegal.

#### **7. Question: I pay my hourly employees every 2 weeks so I just pay overtime for any hours worked over 80. Is this okay?**

**Answer:** No, each week stands alone and cannot be averaged for minimum wage or overtime. A workweek is defined as a period of 168 hours during seven consecutive 24-hour periods.

**8. Question: I require my food servers to pool their tips and I disburse these tips among all my employees. Is this okay?**

**Answer:** No - Tips belong to the employees who provide the service and only the employees to whom the tips belong should arrange any tip pool agreements.

**9. Question: We have a tip container for patrons to leave tips at our espresso bar. We donate all tips collected to local charities. Is this okay?**

**Answer:** Again, no. Tips belong to the employees and employers should not try to control them.

**10. Question: Can I require my employees to report to their workstations 15 minutes before their shift begins?**

**Answer:** Only if you pay them for it. Preparatory and concluding activities are hours worked.

**11. Question: Can I require my employees to report to work and wait around to see if we are busy enough to need their services?**

**Answer:** Time spent waiting is hours worked. You can pay different rates as long as these rates meet minimum wage requirements and do not conflict with other agreements.

**12. Question: Is it true that since I pay my employees on a salary basis, I don't need to be concerned about overtime?**

**Answer:** Paying employees on a salary basis is only one of many methods of payment. You still must pay overtime for all hours worked over 40 in a workweek unless the employee specifically meets an exemption from the overtime provisions of Montana statutes. (For a list of exemptions request a Quick Reference Guide from the Wage & Hour Unit.)

**13. Question: Do I need to pay employees for staff meetings held in the evenings, which are not during my employees' regular hours of work?**

**Answer:** All of the following criteria must be met in order for meetings and training not to be considered hours worked. Not work time if:

- i. attendance is outside of employee's regular working hours,
- ii. attendance is voluntary
- iii. not directly related to employee's job, AND
- iv. employee does not perform any productive work during attendance.

**14. Question: Must I pay unused vacation pay to an employee who quits?**

**Answer:** The wage and hour laws do not require that an employer provide vacation pay (private sector) but they do say if promised and earned, it is due and payable. So whether or not vacation pay is due depends on your policies and how they are written and implemented.

**15. Question: Must I give severance pay to departing employees?**

**Answer:** The wage and hour laws do not require severance pay.

**16. Question: Can I give compensatory time off to employees instead of paying them overtime?**

**Answer:** The private sector cannot substitute compensatory time for overtime unless the employees are exempt from the overtime provisions of the law. Note: Use of comp time for Administrative, Executive or Professional employees may jeopardize exempt salary status.

**17. Question: If an employee actually works 40 hours during the workweek and I also pay him 8 hours of holiday pay, do I need to pay time and a half for 8 of these hours?**

**Answer:** No, wage and hour laws do not require that holiday pay, sick leave, or vacation hours be counted toward the 40 hours unless actually worked.

**18. Question: How often are breaks required to be given and how long must they be?**

**Answer:** Neither the Federal nor the State of Montana wage and hour laws require that breaks be provided. However, if rest breaks are provided they are considered hours worked. Meal periods are also hours worked unless certain criteria are met:

- a. Completely relieved of duty **and**
- b. Are at least 30 minutes in duration.

Additionally, if your business is covered by a collective bargaining agreement and breaks and duty free mealtime are identified in the contract, they are to be honored.

**19. Question: Can I hire 14 and 15-year-olds during the school year?**

**Answer:** Yes, as long as the specific employment is not prohibited and you adhere to the allowed hours of work.

**20. Question: What hours can 14 and 15-year-old youths not be employed?**

**Answer:** Unless otherwise exempt, 14 and 15 year old youths may not work:

- ❖ during school hours;
- ❖ Before 7 a.m. or after 7 p.m., except until 9 p.m. during the summer months;
- ❖ More than 3 hours per day on a school day;
- ❖ More than 18 hours per week during school weeks;
- ❖ More than 8 hours per day on non-school days;
- ❖ More than 40 hours per week in non-school weeks.

**Reference: MCA 41-2-115**

**21. Question: I have a written policy that requires employees to get written permission before they are allowed to work any overtime; however, I have one employee who comes in early and stays late without approval. Must I pay him overtime?**

**Answer:** Unless the employee is exempt from overtime, you must pay the employee overtime for all hours worked over 40 in a workweek. If an employee does not follow your established rules and policies, you should address these problems through disciplinary measures.

**General Guidelines:**

**Wage and Hour Laws Do Not Require**

- Vacation pay (private sector) – if promised and earned, is due and payable
- Holiday or sick pay (private sector)
- Severance pay
- Rest breaks or meal periods
- Holidays off
- Pay raises or fringe benefits
- Time clocks to be used

The Wage & Hour Unit has no jurisdiction over scheduling employees, disciplinary actions or termination

**Hours Worked**

- Includes all the times an employee is required to be on duty or on the employer's premises or at a prescribed work place and all the time during which they are suffered or permitted to work for the employer.
- Meal periods unless certain criteria are met: 1) completely relieved of duty and 2) at least 30 minutes in duration
- Staff/business meetings and training. Not work time if: 1) attendance is outside of employee's regular working hours; 2) attendance is voluntary; 3) not directly related to employee's job, and 4) employee does not perform any productive work during attendance.
- Sleeping time on a shift of less than 24 hours
- Preparatory and concluding activities
- Rest breaks
- Time spent waiting
- Travel time

### **Independent Contractor Related Questions:**

(Contact ERD Independent Contractor Central Unit – 406-444-9661 for more information)

#### **22. Question: I sometimes hire independent contractors. How is independent contractor status defined?**

**Answer:** According to the law, “independent contractor” means: a person who renders **service** in the course of an occupation and:

- A. Has been and will continue to be free from control and direction over the performance of the services, both under the contract and in fact; and
- B. Is engaged in an independently established trade, occupation, profession or business.

If the above requirements are not met, an individual performing services for payment is presumed to be an employee. **Reference: MCA 39-71-120**

#### **23. Question: What are the legal requirements for contractor registration and exemption?**

**Answer:** All contractors and subcontractors **in the construction and building industry**, whether they have employees or not, must register. Contractor registration does not apply to other industries.

The issue of exemptions applies to independent contractors in **ALL** industries, not just building and construction. State law requires ALL independent contractors to obtain Worker's Compensation for him/herself **OR** obtain an official exemption from the Department of Labor & Industry. **Reference: MCA 39-9-201, MCA 39-71-120.**

### **Workers' Compensation Related Questions:**

(Contact ERD Workers Compensation Assistance 406-444-6543 for more information)

#### **24. Question: If I hire someone with a previous injury, am I responsible for the injury?**

**Answer:** If an employee has an injury from a previous employment, the previous employers' workers' compensation insurance is responsible for any costs associated with that injury. If the employee re-injures them self or sustains another injury while working for you, then your workers' compensation insurance is responsible for the injury. **Reference; Department of Labor & industry Employment Relations Division (406)-444-6543**

### **Human Rights, ADA & Discrimination Related Questions:**

(Contact ERD Human Rights Bureau – 406-444-2884 for more information)

#### **25. Question: As an employer under the Americans With Disability Act when am I required to make a reasonable accommodation?**

**Answer:** Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodations also include adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

An employer is only required to accommodate a “known” disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individuals' known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest an appropriate accommodation, the employer and the individual should work together to identify one.

The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition an employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employers’ business. “Undue Hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature and structure of the employers’ operation. Undue hardship is determined on a case- by-case basis. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with the disability should be given the option of paying that portion of the cost which would constitute an undue hardship of providing the accommodation. **Ref: Americans with Disabilities Act, Chapter 3 sections 3.1-3.9. Helpful resource: ADA Services Unit, EEOC 1-800-0669-4000**

**26. Question: Can I refuse to hire people who smoke?**

**Answer:** You can implement smoking and nonsmoking policies during work hours; however—generally, discrimination is prohibited for the use of lawful products during nonworking hours.

**General Human Resource Management Related Questions:**

**27. Question: What information should be included in an employees’ handbook?**

**Answer:** Employee handbooks should include clearly written and defined major policies of your company. Having clearly written policies that are shared with and signed off by your employees will help them to understand and follow them. It gives supervisors a tool to use when dealing with employee problems. Furthermore, it may be of assistance to you in dealing with disciplinary problems and issues of discharge.

Policies may include, but are not limited to: Absences, Alcohol/Drugs, Americans with Disabilities Act, Discipline, Breaks and Meal Times, Hiring and Promotions etc.

**28. Question: Is it necessary that I give a discharged employee a reason for discharge?**

**Answer:** (1) It is the duty of any person after having discharged any employee from service, upon demand by the discharged employee, to furnish the discharged employee in writing a statement of reasons for the discharge. Except as provided in subsection (3), if the person refuses to do so within a reasonable time after the demand, it is unlawful for the person to furnish any statement of the reasons for the discharge to any person or in any way to blacklist or to prevent the discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.

(2) A written demand under this part must advise the person who discharged the employee of the possibility that the statements may be used in litigation.

(3) A response to the demand may be modified at any time and may not limit a person's ability to present a full defense in any action brought by the discharged employee. Failure to provide a response as required under subsection (1) may not limit a person's ability to present a full defense in any action brought by the discharged employee. **Ref: MCA 39-2-801**

**29. Question: How can I avoid a wrongful discharge suit?**

**Answer:** Any former employee can file a wrongful discharge suit, but some up-front work by the employer can make the difference in court.

Some suggestions include:

- ✓ Keep documentation on all your employees' performance (not just on problem employees). Enter dates of problems and document all actions taken.
- ✓ Be aware of any protected group that your employees belong to, such as, minority or handicapped.
- ✓ Enforce company policy in the same manner for each of your employees.
- ✓ Communicate and apply uniform standards of performance to all employees.
- ✓ Communicate company policies regarding behavior, dress, and off-duty conduct to all employees.
- ✓ Avoid making negative (or any) remarks about an employee's age, gender, religion, race, or ethnic origin.
- ✓ Refrain from complaining about employees' personality flaws when giving termination notice.
- ✓ Avoid terminating any employee based on absences due to serving on jury duty, serving in the military or fulfilling any other civic duty.
- ✓ Don't terminate any employee to avoid paying benefits that he or she would be entitled to.
- ✓ Avoid terminating an employee for any political or social behavior done outside the office for which there is no stipulated company policy.

**General Guidelines:**

**Records required to be kept include -**

- Name in full
- Social Security Number
- Home address
- Date of birth
- Time of day and day of week employee's workweek begins
- Regular hourly rate of pay and length of pay period
- Hours worked each work day and total hours worked each workweek
- Date of payment and pay period covered by payment
- Total daily or weekly straight time earnings or wages
- Total weekly overtime compensation
- Total additions to or deductions from wages
- Total wages paid each pay period

Records required for exempt employees differ from those for nonexempt workers. Also, special information is required on employees under uncommon pay arrangements or to whom board, lodging or other facilities are furnished. Records of the required information must be preserved for 3 years.